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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a federally recognized Indian tribe, accorded treatment as a state status by the Environmental Protection Agency pursuant to section 518(e) of the Clean Water Act, as amended, 33 U.S.C. § 1377(e), has authority delegated by Congress to establish water quality standards for fee lands owned by non-members within the borders of its reservation.

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STATEMENT OF INTEREST

The Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana ("Fort Peck"), *amicus curiae* herein,[1] is a federally recognized Indian tribe which exer-

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[1] Pursuant to Rule 37.6, it is stated that counsel for *amicus curiae* authored all of this Brief in Opposition, and no person or

cises substantial governmental duties and powers through an elected Tribal Executive Board. As such, and like respondent Confederated Salish and Kootenai Tribes of the Flathead Reservation ("Flathead Tribes"), Fort Peck qualifies for treatment as a state ("TAS") by the Environmental Protection Agency ("EPA") under Section 518(e) of the Clean Water Act, as amended ("CWA"), 33 U.S.C. § 1377(e).

On March 24, 1994, Fort Peck applied to EPA for approval of a water quality standards program pursuant to sections 303 and 518(e) of the CWA. In its application Fort Peck asserted authority over all water resources within the boundaries of the Fort Peck Reservation, including water appurtenant to fee patented lands owned by non-members. Fort Peck's assertion of authority included the power to regulate the water related activities of all persons within the Reservation which might impair the quality of Reservation water resources and critical habitat. As was the case with respect to the Flathead Tribes, the State of Montana opposed Fort Peck's application to EPA, alleging that Indian tribes have no jurisdiction over non-member activities on fee lands. On August 29, 1996, however, EPA approved Fort Peck's application in its entirety. Again as was the case with respect to the Flathead Tribes, Montana has challenged that determination in court. *See State of Montana v. U.S. Environmental Protection Agency*, No. CV-97-49-BLG-JDS (D. Mont.).

The ability to supervise all environmentally sensitive water uses within the Reservation is essential to an effective tribal water quality standards program. Accordingly, because of its direct and obvious interest in the issue here presented, Fort Peck submitted an *amicus curiae* brief in

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organization other than *amicus curiae* made a monetary contribution to the preparation or submision of the brief. Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief *amicus curiae*, and those consents have been filed with the Clerk.

support of the Flathead Tribes in the district court (*see* Petition at 29a-30a, 44a, n. 10) and, with other Indian tribes, also an *amicus curiae* brief in the court below.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S QUESTION PRESENTED IS ACADEMIC AND THUS NOT WORTHY OF THIS COURT'S CONSIDERATION BECAUSE, AS JUSTICE WHITE RECOGNIZED IN *BRENDALE V. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION*, CONGRESS IN THE CLEAN WATER ACT EXPRESSLY DELEGATED TO INDIAN TRIBES AUTHORITY TO ESTABLISH WATER QUALITY STANDARDS FOR RESERVATION LANDS OWNED BY NON-MEMBERS.

A. The issue posed by petitioners is not dispositive of the case.

In *Montana v. United States*, 450 U.S. 544 (1981), recently reaffirmed in *Strate v. A-1 Contractors*, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), this Court determined that, although the general rule may be otherwise, Indian tribes under federal common law have inherent sovereignty to regulate the conduct of non-members on fee patented lands within their reservations where "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . ." *Strate v. A-1 Contractors*, 117 S.Ct. at —, 137 L.Ed.2d at 671 (quoting *Montana*, 450 U.S. at 565-66). In this case, EPA, the district court and the unanimous Ninth Circuit panel below all concluded that the serious and substantial impact of water quality upon human health and welfare fully justified application of this so-called second *Montana* exception in the context of the CWA.[2] As posed by petitioners, the question here pre-

[2] The principle that Indian tribes, under appropriate circumstances, can exercise civil regulatory authority over non-member

sented thus is whether an Indian tribe under *Montana* can exercise "inherent regulatory authority" with respect to water resources on fee lands owned by non-members within its reservation. That question, however, need not and should not be addressed by the Court.

Specifically, in *Strate* this Court also declared that "the general rule and exceptions . . . announced [in *Montana*] *govern only in the absence of a delegation of tribal authority by treaty or statute.*" 117 S.Ct. at —, 137 L.Ed.2d at 673 (emphasis added). The threshold question before the Court in this case, therefore, is whether sections 518(e) and (h)(1) of the CWA, 33 U.S.C. §§ 1377 (e) and 1377(h)(1), effect a delegation of regulatory authority to Indian tribes. According to *Strate*, if "after and in light of that examination" (117 S.Ct. at —, 137 L.Ed.2d at 673) the proposition is clear—as it is (*see* discussion Point B *infra*)—that Congress in the CWA has authorized Indian tribes to regulate water resources appurtenant to non-member owned fee lands within their reservations, then the Court need never consider *Montana's* general rule and its exceptions. In short, the question presented by petitioners is academic and the case plainly unworthy of this Court's review.

B. Congress delegated regulatory authority to Indian tribes in the CWA.

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, supra,* Justice White, for himself and three other members of the Court, cited the CWA ("33 U.S.C. § 1377(e) and (h)(1)") as a statute where "Congress has expressly delegated" to Indian tribes "the

activities on fee patented reservation lands is now well settled. This Court so held with respect to the "closed area" involved in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 440 (1989) (opinion of Stevens, J.); *see also Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.")

power to . . . [regulate] fee lands of non-members of the Tribe." 492 U.S. at 428. That Justice White's characterization of the CWA is apt appears on the face of the statute.

The territory in which a tribe may exercise its jurisdiction, if accorded TAS status by EPA, is defined in section 518(e), 33 U.S.C. § 1377(e). Under section 518(e)(2), Indian tribes may exercise governmental powers with respect to "the management and protection of water resources" which are: (1) "held by an Indian tribe," (2) "held by the United States in trust for Indians," (3) "held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation," or (4) *"otherwise within the borders of an Indian reservation."* 33 U.S.C. 1377(e)(2) (emphasis added). The first three of these categories involve only tribal lands and individually owned trust lands. The fourth statutory category necessarily applies to fee lands.[3] Indeed, any other construction of the fourth provision would render it redundant and surplus verbiage in contravention of the cardinal rule of statutory construction that all provisions of a statute must be given effect and "should be interpreted so as not to render one part inoperative." *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. ——, 127 L.Ed.2d 165, 174 (1994) (citing *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

The phrase "otherwise within the borders of an Indian reservation" is clear and unambiguous.[4] An Indian reser-

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[3] Petitioners do not contest the authority of the Flathead Tribes to regulate activities on fee lands owned by tribal members. Petition at 8, n.3; *see* the unanimous opinion by (then) Justice Rehnquist in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 477-79 (1976), in which this Court rejected the State's claim of tax jurisdiction over Indians living on fee lands within the Flathead Reservation.

[4] Even if this language were ambiguous, well settled canons of statutory construction dictate that the phrase be broadly construed

vation is defined for purposes of the CWA as "*all* land within the limits of any Indian reservation . . . *notwithstanding the issuance of any patent*, ..." 33 U.S.C. § 1377(h)(1) (emphasis added), or, in other words, as including all reservation lands regardless of their fee patent status or non-member ownership. This Court has so held under comparable circumstances. *See, e.g., Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) (identical statutory definition of "Indian country" in 18 U.S.C. § 1151 held to include fee patented land owned by a non-Indian); *see also Solem v. Bartlett*, 465 U.S. 463, 468 (1984). In short, when treated as a state by EPA under section 518(e) of the CWA, an Indian tribe's territorial jurisdiction and resultant administrative authority are reservation-wide by virtue of an express statutory definition.

The proposition that Congress may delegate to Indian tribes civil regulatory powers over non-members on fee lands within a reservation is not open to question. *See* (then) Justice Rehnquist's opinion for a unanimous Court in *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975). As Justice White recognized in *Brendale*, Congress did so in the CWA. The Court, therefore, need not and should not ever decide whether the Flathead Tribes also possess "inherent regulatory authority" under *Montana* to promulgate water quality standards on all lands within the borders of their reservation.

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in favor of the Indians. *County of Yakima v. Yakima Nation*, 502 U.S. 251, 269 (1992) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)); *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

CONCLUSION

In response to the State's attack upon Fort Peck's regulatory authority under the CWA over all Reservation lands (*Montana v. EPA*, No. CV-97-49-BLG-JDS (D. Mont.), *supra* at 2), Fort Peck is raising before the district court the powerful delegation argument described in this brief. The limited question here presented by petitioners is plainly not dispositive of the underlying issues in the present case. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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